Thangarajoo a/l Vyran v Denko Industrial Corp Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D29–3242 OF 2010
MOHAMAD ARIFF J
6 JANUARY 2011

Bankruptcy — Practice and procedure — Stay of proceedings — Application for stay pending appeal against judgment on which bankruptcy proceedings were based — Whether court should exercise discretion to grant stay — Whether there was sufficient reason for court to exercise discretion — Whether stay would result in undue prejudice to judgment creditor — Bankruptcy Act 1967 s 97

Denko Industrial Corporation Bhd ('the judgment creditor') had obtained judgment against Thangarajoo a/l Vyran ('the judgment debtor') and another in a civil suit instituted by the judgment creditor. Under this judgment, the judgment debtor had been ordered to pay the judgment creditor the sum of RM3m. The judgment creditor then proceeded with bankruptcy proceedings against the judgment debtor. The judgment debtor, who had appealed against the judgment obtained by the judgment creditor against him, applied for a stay of the bankruptcy proceedings pending the hearing of his appeal. The senior assistant registrar dismissed this application and hence the present appeal. The judgment creditor raised the issue that there had been no stay of execution on the judgment by the judgment debtor.

Held, allowing the appeal with no order as to costs:

(1) It is established law that pursuant to s 97 of the Bankruptcy Act 1967 the judgment debtor needed only to show a 'sufficient reason' for the court to exercise its discretion to grant stay and not the higher threshold of 'special circumstances' in an ordinary application for a stay of execution of a judgment pending appeal. The judgment debtor had raised reasonable grounds for the appeal before the Court of Appeal. As these grounds were not totally unmeritorious or lacking in bona fides, they should not be rejected summarily without the judgment debtor being given an opportunity to ventilate his case fully before the Court of Appeal. It was found that this was a proper case for the court to exercise its discretion to grant a stay of the judgment debtor's application (see para 6).

(2) It would have been an improper exercise of the court's judicial discretion to take the fact that there was no stay of execution of the judgment pending appeal as the only relevant factor in deciding whether this was a proper case for a stay to be granted (see para 3).

(3) Bankruptcy proceedings were provided to facilitate recovery of a sum due

on a proper judgment, but should not be a procedural avenue to be raised *in terrorem* against a judgment debtor who had not fully exhausted his rights of appeal. Further the stay would not result in any undue prejudice to the judgment creditor, considering the present speed in the disposal of appeals by the Court of Appeal (see para 7).

[Bahasa Malaysia summary

Denko Industrial Corp Bhd ('pemiutang penghakiman') telah memperolehi penghakiman terhadap Thangarajoo a/l Vyran ('penghutang penghakiman') dan seorang lagi dalam tindakan sivil yang dimulakan oleh pemiutang penghakiman. Di bawah penghakiman ini, penghutang penghakiman telah diperintahkan untuk membayar pemiutang penghakiman sejumlah RM3 juta. Pemiutang penghakiman kemudiannya meneruskan dengan prosiding kebankrapan terhadap penghutang penghakiman. Penghutang penghakiman, yang merayu terhadap penghakiman yang diperolehi pemiutang penghakiman terhadapnya, memohon untuk penangguhan prosiding kebankrapan sementara menunggu rayuannya. Timbalan kanan pendaftar menolak permohonan ini dan maka rayuan ini. Pemiutang penghakiman membangkitkan isu bahawa tidak terdapat penangguhan pelaksanaan penghakiman oleh penghutang penghakiman.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Ia adalah undang-undang yang ditetapkan bahawa berikutan s 97 Akta Kebankrapan 1967 penghutang penghakiman hanya perlu untuk menunjukkan 'sufficient reason' untuk mahkamah menjalankan budi bicaranya memberi penangguhan dan bukan ambang tinggi 'special circumstances' dalam permohonan biasa untuk penangguhan pelaksanaan penghakiman sementara menunggu rayuan. Penghutang penghakiman telah membangkitkan alasan yang munasabah untuk rayuan di hadapan Mahkamah Rayuan. Memandangkan alasan-alasan ini bukan tidak bermerit sepenuhnya atau tidak mempunyai *bona fides*, ia tidak patut ditolak secara terus tanpa penghutang penghakiman diberi peluang untuk menyuarakan kesnya di hadapan Mahkamah Rayuan. Ia didapati bahawa kes ini adalah kes betul untuk mahkamah melaksanakan budi bicaranya untuk memberikan penangguhan permohonan penghutang penghakiman (lihat perenggan 6).

(2) Ia akan menjadi pelaksanaan yang tidak sempurna budi bicara kehakiman mahkamah mengambilkira fakta bahawa tidak terdapat penangguhan pelaksanaan penghakiman sementara menunggu rayuan memandangkan satu-satunya faktor yang relevan dalam memutuskan sama ada kes ini adalah kes betul untuk penangguhan diberikan (lihat perenggan 3).

(3) Prosiding kebankrapan diperuntukkan untuk memudahkan

mendapatkan balik jumlah yang patut dibayar atas penghakiman yang betul, tetapi bukan patut menjadi jalan prosedur untuk dibangkitkan *in terrorem* terhadap penghutang penghakiman yang tidak menggunakan sepenuhnya hak-hak merayu. Selanjutnya penangguhan tidak akan mengakibatkan apa-apa prejudis tidak wajar kepada pemiutang penghakiman, dengan mempertimbangkan kelajuan sekarang ini dalam menyelesaikan rayuan-rayuan oleh Mahkamah Rayuan (lihat perenggan 7).]

Notes

For cases on stay of proceedings, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3305–3309.

Cases referred to

Rhodes, In Re; Ex Parte Heyworth (1884) 14 QBD 49, CA (refd)

Rosli Abdul Kadir, Re; Ex P Bank Kerjasama Rakyat Malaysia Bhd [2008] 5 CLJ 691, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 97

Harikannan (Jayadeep Hari & Jamil) for the judgment debtor.
Emilianie Chin Woan Yun (YH Teh & Quek) for the judgment creditor.

Mohamad Ariff J:

STAY APPLICATION: ENCL 11

[1] This was an appeal from the decision of the senior assistant registrar who had dismissed the judgment debtor's application to have the hearing of the creditor's petition stayed pending the hearing of the judgment debtor's appeal in the Court of Appeal on the judgment recorded which formed the foundation for the instant bankruptcy proceedings.

[2] The judgment debtor had been ordered by the High Court to pay a sum of RM3,000,000 to the judgment creditor. The judgment was dated 5 April 2010.

[3] There was no stay on the execution of the said High Court judgment. I allowed the appeal nevertheless. In exercise of this court's discretion, this was a proper case for stay to be granted. The grounds raised by the judgment debtor were not totally unmeritorious or lacking in bona fides that they should be rejected summarily without according him the opportunity to ventilate his case fully before the Court of Appeal. That there was no stay of execution of the judgment pending appeal was a relevant consideration, but it would have been

an improper exercise of this court's judicial discretion to take this as the only relevant factor. It is established law that pursuant to s 97 of the Bankruptcy Act 1967 the judgment debtor needed only to show a 'sufficient reason' for the court to exercise its discretion to grant stay, not the higher threshold of 'special circumstances' in an ordinary application for a stay of execution of a judgment pending appeal. This was an application for stay in bankruptcy proceedings where the governing principle must be as laid down in s 97. See *Re Rosli Abdul Kadir; Ex P Bank Kerjasama Rakyat Malaysia Bhd* [2008] 5 CLJ 691:

> Section 97 of the Bankruptcy Act 1967 the provision under which the application is made provides as follows:
>
> The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.
>
> The 'special circumstances' test is an acceptable test in an application for a stay of execution usually pending appeal. This has been affirmed by the Federal Court in several cases which need not be cited here as this is a well accepted guiding principle in deciding whether a stay of execution of a judgment should be granted or not pending appeal against a judgment. Nevertheless the 'special circumstances' test is a creation of the courts and is not provided by the statutes. 'Special circumstances' are also referred to as 'special grounds' by certain courts.
>
> The test of 'special circumstances' or 'special grounds' is distinct from the test of 'sufficient reason' in its principle, legal meaning, weight to the test, degree of burden to be proved to satisfy the court and particular facts that need to be adduced to pass each test. Even the words 'special' and 'sufficient' are different in their ordinary meanings.
>
> … Certainly, the weight and degree of burden to be proved to satisfy the court in 'special circumstances' test is higher than the 'sufficient reason' test and the weight and the degree of burden to be proved to satisfy the court in 'sufficient reason' test is lower than in the 'special circumstances' test. To quote the words of Abdul Hamid Mohamad JCA (as he then was) in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 (CA):
>
> … the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal)
>
> … In our local case of *Malayan Banking Bhd v Datuk Lim Kheng Khim (2)* [1992] 3 CLJ 1616;[1992] 2 CLJ (Rep) 840, 3Abdul Hamid Mohamad JC (as he then was) exercised His Lordship's discretion to stay further bankruptcy proceeding until the appeal is heard, as some serious points of law have been raised in this proceedings which no doubt will be decided by the Supreme Court, on appeal. (at pp 693–695)

[4] In the common law case of *Ex Parte Heyworth, In Re Rhodes* (1884) 14 QBD 49 the proposition was advanced in very categorical terms that where

there was a reasonable ground for an appeal the hearing of a bankruptcy petition ought to be adjourned. The following passage by Bowen LJ is particularly relevant:

> … Assuming that the appellant is right in saying that the sum is due to him in a final judgment, the judgment … is under appeal, and the question is, whether the pendency of this appeal justified the registrar in ordering the petition to stand over for the present. This was an exercise of the registrar's discretion. *It cannot of course, be said that the mere fact that an appeal is pending from the judgment gives the debtor an absolute right to a stay of proceedings, or to have the petition dismissed … The registrar is clothed with discretion: he has an absolute discretion to consider what is the best thing to be done under the circumstances. And it would be impossible for this court to interfere with the exercise of his discretion unless we were satisfied that the registrar could not have been light If it could be shown that the appeal from the judgment must be frivolous one, we might reverse his decision. But so long as he might reasonably have come to the conclusion that there was a reasonable ground of appeal, it would be a monstrous thing that a receiving order should be made while the appeal is pending.* (At pp 51–52 of the report) (Emphasis added.)

[5] Having considered the judgment creditor's grounds advanced for the appeal, there existed serious points of law and fact to be ventilated before the Court of Appeal.

[6] The judgment was obtained in a suit instituted by the judgment creditor against the judgment debtor and a company called Gigantic Innovations Sdn Bhd. The immediate parties were the judgment creditor and Gigantic Innovations and the contract was for the judgment creditor to purchase Gigantic Innovations' shares in another company called Teknik Datasaab Sdn Bhd, for which a profit guarantee of RM3m was given by Gigantic Innovations. It was further provided if there was a shortfall, Gigantic Innovations would pay to Teknik Datasaab Sdn Bhd that shortfall. The judgment creditor in turn provided a guarantee that if Gigantic Innovations failed to top up the shortfall, the judgment creditor himself would pay the shortfall to Teknik Datasaab Sdn Bhd. It was the judgment debtor's contention that the judgment creditor, as merely a shareholder in Teknik Datasaab, was not a recipient of the shortfall covered by the guarantee provided by the judgment debtor, as opposed to Teknib Datasaab itself. These were reasonable grounds for the appeal before the Court of Appeal. Although there might not be special circumstances to warrant stay of execution of the judgment, there would be a 'sufficient reason' to allow an application for stay of the bankruptcy proceedings until the issues are fully ventilated before the Court of Appeal.

[7] Bankruptcy proceedings are provided to facilitate recovery of a sum due on a proper judgment, but should not be a procedural avenue to be raised *in terrorem* against a judgment debtor who has not fully exhausted his rights of

appeal. Seeing that bankruptcy proceedings have disastrous consequences to a person's life and livelihood, the court's judicial discretion should, I feel, be properly considered against the full circumstances of the case at hand and not be made merely dependent mechanistically on whether there has been a stay of execution on the judgment. The issue in this connection is thrown in sharper relief when the present speed in the disposal of appeals by the Court of Appeal is considered. The fixing of the hearing date for the appeal was a matter of time, when the application for stay came before this court. It would not have resulted in any undue prejudice to the judgment creditor if it be made to patiently wait for a short duration for the appeal to be heard and disposed.

[8] For the above-stated reasons, I allowed the judgment debtor's application for stay in encl 11, with no order as to costs.

Appeal allowed with no order as to costs.

Reported by Kohila Nesan